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No. 79-59

In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF ILLINOIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioners contend that, in upholding an order of the Interstate Commerce Commission authorizing the abandonment of a 36-mile railroad route segment in southern Illinois, the court of appeals improperly supplemented agency findings of fact and imposed a new condition on the agency's order.

1. In January 1976, respondent Illinois Central Gulf Railroad Company filed an application with the Interstate Commerce Commission seeking a certificate of public convenience and necessity permitting the abandonment of the railroad line segment from milepost 554 near Murphysboro, Illinois, south to milepost 518 near Elco, Illinois (Pet. App. 3a, 16a, 20a). See 49 U.S.C. (1970 ed.) 1(18). Petitioners opposed the proposed abandonment. After the parties filed verified statements and supporting materials in accordance with the Commission's

procedures (Pet. App. 2a, 20a), a Commission review board ruled that the application should be granted and a certificate of abandonment issued (*id.* at 27a-28a). An appellate division of the Commission agreed (*id.* at 29a-39a), and the full Commission denied review on the ground that "no issue of general transportation importance is involved in this proceeding" (*id.* at 40a-41a).

The evidence in the record indicates that the line segment to be abandoned handled an average of less than two carloads per mile annually in 1974, 1975, and 1976 (Pet. App. 4a, 21a, 25a, 32a-33a). The review board noted that petitioners did not "submit[ ] testimony from a single shipper served by the track to be abandoned which states that there is a need for the rail service or that such shipper would be hurt by the abandonment" (*id.* at 26a). The board also observed that the line in question produced financial losses in 1974, 1975, and 1976 (*id.* at 21a, 26a, 33a-34a). With respect to traffic south of the abandoned segment, the board stated that "Elco and Tamms will still be served via the alternate Cairo route after abandonment" (*id.* at 24a). The board explained that "continued operation of a line should not be required merely because of bridge traffic [*i.e.*, traffic travelling over a particular segment but not originating or terminating on the segment] that can be handled as expeditiously over another route" (*ibid.*).

The Commission's appellate division rejected petitioners' contention that this abandonment proceeding should have been consolidated with another such proceeding involving the proposed abandonment of an east-west line of the Missouri Pacific Railroad Company that serves Tamms, Illinois, and crosses the Illinois Central Gulf line at a point south of the Murphysboro-Elco segment here at issue (see Pet. App. 3a, 7a, 16a, 30a). The appellate division stated that consolidation was unnecessary because, even if both abandonment

applications were granted, "Tamms [would] still have rail service * * * provided over an alternate route," *i.e.*, the now-unused Elco-Cairo segment mentioned by the review board (*id.* at 30a-31a). See also *id.* at 37a, referring to Illinois Central Gulf's "proposed operation of trains between Cairo and Elco via Tamms." The appellate division concluded (*id.* at 38a):

> The evidence in this proceeding shows a line of track in poor condition which has very minimal car movements, that the revenue obtained from such movements is miniscule given the cost of maintenance and rehabilitation, that constant deficits have been incurred on the line and that there is no substantial showing that actual traffic movements over the segment will increase in the forseeable [*sic*] future. The Board's finding that public convenience and necessity permit the proposed abandonment was therefore in order.

On appeal, petitioners argued that the Commission erred in failing to consolidate this proceeding with the pending Missouri Pacific abandonment application. Petitioners contended that, in view of the additional traffic Illinois Central Gulf could expect in the aftermath of the Missouri Pacific abandonment, the Commission was incorrect in its statement that "there is no substantial showing that actual traffic movements over the [Murphysboro-Elco] segment will increase in the forseeable [*sic*] future" (see Pet. App. 38a). The court of appeals held that the Commission did not abuse its discretion in refusing to consolidate the abandonment proceedings. At oral argument, counsel for the Commission called the court's attention to the Commission's expectation that the traffic now handled by the Missouri Pacific segment proposed to be abandoned would in the future be handled by reinstituted service over Illinois

Central Gulf's Cairo-Elco line (*id.* at 11a; see also *id.* at 24a, 30a-31a, 34a, 37a). The court found this to be a "sufficient explanation of the [Commission's] allegedly inconsistent findings" in the two abandonment proceedings (*id.* at 11a), and it therefore concluded that abandonment of the Murphysboro-Elco segment "may proceed, contingent upon the restoration of the service to Tamms and Elco via Cairo" (*id.* at 15a).

2. Petitioners contend (Pet. 9-11) that the court of appeals improperly "accept[ed] appellate counsel's explanations so as to supply missing agency findings" (*id.* at 9) and erroneously added a new condition to the Commission's order. Neither argument is persuasive.

Although the court of appeals did refer to statements made by Commission counsel at oral argument (Pet. App. 11a), it did not rely on those statements to supply "missing agency findings." Rather, the court simply acknowledged the Commission's own explanation of why traffic will not increase over the Murphysboro-Elco segment even if the Missouri Pacific abandonment is effected. The Commission's review board and appellate division both contemplated that traffic from Tamms previously handled by the Missouri Pacific would be handled by Illinois Central Gulf through restored service over the Cairo-Elco segment (*id.* at 24a, 25a, 30a-31a, 34a, 37a). Contrary to petitioners' assertions, the court of appeals did not rely on counsel's oral argument to remedy "material deficiencies in the agency report" (Pet. 10).

Nor did the court impose a new condition on the agency's order. The Commission itself approved Illinois Central Gulf's proposed abandonment on the understanding that "Elco and Tamms will still be served via the alternate Cairo route after abandonment" (Pet. App. 24a). When the court of appeals ruled that the abandonment may proceed, "contingent upon the restoration of service

to Tamms and Elco via Cairo" (*id.* at 15a), the court merely registered its approval of the basis on which the Commission had earlier decided that the abandonment should be authorized.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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